In Re Holocaust Victim Assets Litigation regarding the Application of Bu...uborne for counsel fees Doc. 83

"I thought that was the center of the universe," he recalled. "There were only two places—Washington Square Park and Paris. There's a wonderful sense of closure that I really feel. When I was a boy, if you had told me that I would some day do what I do, I would say it is so far out of my reach that it is utterly incomprehensible. I walk through the park every night when I go home."

His parents had wanted their only son, the first of his family to go to college, to be a doctor, so in 1957 he entered Cornell at age 16 as a pre-med. But by junior year, his mediocre science grades and physical clumsiness made him wonder if medicine was his calling. In a comparative anatomy class, he remembered, he reached for a dead shark specimen in a tank filled with formaldehyde. "I was so nervous and tense about being there that I fell into the formaldehyde. I stank for weeks. No matter what I did I couldn't get the smell off." In organic chemistry, he smashed a glass globe and splashed his eyes with sulfuric acid. "I thought, 'Somebody's trying to tell me something.' "

He finally told his parents that he couldn't be a doctor, but that perhaps he would become a lawyer. "My father said, 'Don't be a lawyer, you'll sell insurance for the rest of your life.' In the Depression, the people he knew who went to law school wound up selling insurance."

He chose law because it was an intellectual field that allowed you "to live like a gentleman"—comfortably but not lavishly. (He points out that he harbored such notions before "the Rolex years" of the 1980s, when the wave of mergers made lawyers wealthy and changed earning expectations.) He met his wife at Cornell; she was a sophomore and he was a junior who belonged to Tau Epsilon Phi. "We were the squarest pegs in the squarest holes," he said. "My fraternity was the last fraternity to serenade a sorority." And, though his contemporaries included fellow New Yorker Andrew Goodman and Cornell classmate Michael Schwerner, who went south to register voters and were slain and buried in Mississippi, Neuborne did not participate in the civil-rights movement in a full-throated way.

Instead, he graduated in February 1961 and joined the Army Reserves, spending seven months at Fort Dix, where he was known as the "college idiot" because he couldn't take his rifle apart. He then entered Harvard Law School while his wife, who had better grades and spoke three languages, went to work as a secretary to support him. "I loved Harvard," Neuborne said. "It was a place of great intellectual excitement."

He then joined a small Wall Street firm, Casey, Lane & Mittendorf, choosing tax work because, he confesses, that was the quickest route to a partnership. It was happenstance that brought him into civil liberties work—a lawyer in his Reserve unit was active in the NYCLU. Neuborne started doing briefs for the NYCLU at night and, by 1967, he realized he was "intrinsically out of place" in his day job. "I was uncomfortable spending all my energy defending very privileged people in ways that reinforced their privilege," Neuborne said. (He took a leave of absence that the firm jokingly extended for 25 years.)

In those days, the NYCLU and ACLU were both located in a building in the Flatiron district honeycombed with left-wing organizations. Aryeh Neier was the NYCLU director. Ira Glasser was associate director. Ruth Bader Ginsburg was a director of the ACLU's women's rights project. "By the second day I knew this was what I was going to do," said Neuborne.

The years between 1967 and 1973, when Neuborne served first as the NYCLU's staff counsel and then as the ACLU's assistant legal director, were heady times and Neuborne talks about them with brio. "It was the Vietnam era, the high point of the egalitarian revolutions, and you couldn't lose. You threw something into court and you won. We used to sketch things out over lunch in the delicatessen. We developed something—I still remember writing it on the napkin—the enclave theory of constitutional justice. What we tried to do was to identify enclaves in American life from which the constitu-

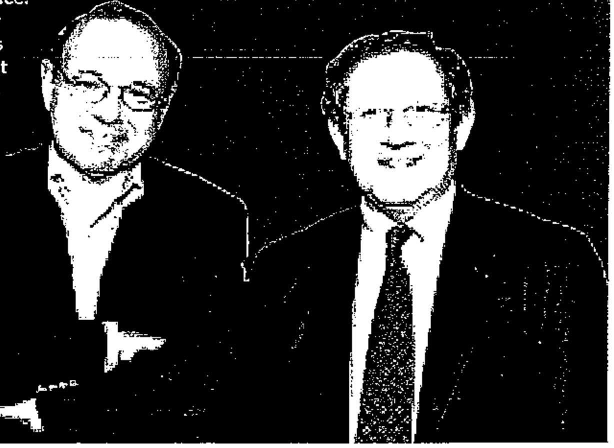
ON-CAMPUS CAMEO: New ACLU Student Chapter Sponsors Lively Debate

The Law School's newest student group, a chapter of the American Civil Liberties Union, hosted a debate on campaign-finance reform for its inaugural event this spring. Burt Neuborne, the John Norton Pomeroy Professor of Law and legal director of the Brennan Center for Justice, faced off against long-time friend and colleague Joel Gora, a law professor at Brooklyn Law School and general counsel to the New York Civil Liberties Union.

The topic: campaign-finance reform and the First Amendment. Professor Neuborne, a national leader in the effort to reduce the role of money in politics who helped craft the Supreme Court brief in favor of the McCain-Feingold campaign-finance reform bill, argued that America's commitment to political equality requires the government to prevent wealth from distorting democracy. He stressed the risks to democracy if nothing is done to limit the power of money to buy political influence. "People think voting doesn't matter because money talks and they don't think they can have an impact," he said. "If we can't get public funding, we have to have limits ... or we're going to condemn ourselves to a slow erosion of democracy."

Professor Gora, a ground-breaker in the fight against restrictions on campaign funding (which his organization considers a violation of the First Amendment) argued that America's commitment to freedom of speech requires the government to stay out of regulating political communication. He stressed the dangers of allowing government to regulate something as crucial as campaign speech. "What is the best way to run our democracy?" Gora asked. "We differ on whether limiting funding is the way to achieve it. Free speech and funding First Amendment rights are not the enemy of democracy—they're the engine of democracy."

The debate was heated but good-humored. Gora noted that Neuborne had signed the brief in *Buckley v. Valeo* back in 1976, a case in which the lawyers argued there should be no limit on campaign finance. Neuborne countered by reminding Gora that one is never too old to reject past errors. The two old friends closed by agreeing to disagree—and to enjoy their exchanges.



Dockets.Justia.com

tion had been shut out: prisons, schools, mental institutions, the military. The students' rights cases came off of that napkin. The mental commitment cases. All of the cases dealing with free speech in the military."

He is proudest of the cases that challenged the Vietnam War, because for a long time "they were existential cases: they couldn't be won, but they had to be brought." Neuborne also handled school desegregation cases, writing a Supreme Court amicus brief for the integration of the Charlotte-Mecklenburg, North Carolina, school system. There, too, his father's influence made itself felt. Neuborne can never forget how as a 13-year-old in 1954 he traveled with his father on a business trip to Charleston, South Carolina, and there saw black-bordered newspapers announcing the Supreme Court's ruling in *Brown v. Board of Education.* His father happened to visit a local black minister that night and Neuborne remembers the jubilation.

"When five percent of the Harvard class was women, we were making it known in the 1970s that we were happy to have a 50-50 class," Neuborne said.

"You have to look at *Brown* as a symbol," he said. "It sent an enormously important message around the world that the law was not what Marx said. Marx said that law was a device to keep the weak in place, that the dominant economic class would use law as a club to prevent competition. Brown allowed the United States to compete in the Cold War with a different vision of law—that one could actually change the status quo on behalf of the poor and the weak. No one had ever thought about law that way. That set off a legal revolution in this country."

It was in 1972 that he began teaching as an adjunct at NYU, and by 1974 he was asked to teach Evidence full time. The 20-hour workdays of the previous few years—the Vietnam War and civil rights cases and briefs flowing out of Nixon's impeachment—helped spur his decision. So did his wife's graduation in 1974 from Brooklyn Law School. Neuborne hoped that teaching law would allow him more time with his two young daughters while Helen launched her career as a Legal Aid lawyer for poor children. He took another leave of absence. "I didn't tell them about my history of leaves," he said.

Although he returned to the ACLU as national legal director from 1982-86, teaching became the center of his work life and has remained so.

"I love this place," he said. "It has tolerated what is a quirky career. I don't have a traditional academic career in that I don't spend my time in my office writing law review articles. I actually go into court and try to put my ideas into practice. Very few schools would have tolerated that. I would have been told by many of my peers to make a choice."

Neuborne has been fortunate that during his 30 years at NYU, the Law School has been on an upward spiral. The school acquired the pasta-making company C.F. Mueller in 1947, and in the late 1970s sold it for $115 million, netting a nice portion of the profit, even after the University got its share. The Law School's administration wisely used the money to provide scholarships for top students, reward deserving faculty, improve its tuition subsidies and loan forgiveness program, and build more inviting housing. The fact that New York became a nicer place to live has not hurt. And NYU benefited by being among the very first law schools to be genuinely open to women.

"When five percent of the Harvard class was women, we were making it known in the 1970s that we were happy to have a 50-50 class," Neuborne said. "We mined that vein of enormous talent of women who had missed the boat when it wasn't possible for them to get into law school."

Neuborne is not the reflexive liberal that he may appear to be, nor is he as convinced as he once was of the sweeping power of a legal decision that squares with his ideology. As a young lawyer, he was champing at the bit to challenge every wrong that came down the pike, but experience has taught him that even a favorable decision doesn't always work out the way one hopes. *Brown*, he said, ended state-supported apartheid in many areas, but it also showed the limits of the law. "You can't say that it successfully led to school integration," he said. We're still a society where by and large people are educated with their own race. It's housing patterns that do it now. So *Brown* was a lesson about what law can't do, the limits of the law."

He also takes some nuanced views on more recent issues. In a conversation last winter just after the Massachusetts Supreme Court said that the state would have to marry gays equally with heterosexuals, Neuborne did not leap to praise the ruling. "I think I'm getting old," he confided. "I think you must provide some form of relationship for gays that is identical to marriage—in terms of property and any kind of legal formulation. Whether you have to call it marriage is a different story. It may be that marriage has a religiously based connotation. Marriage was a sacrament before it was law. And the notion that the law will now turn marriage into something that historically it was not simply to achieve equality strikes me as at least problematic."

Neuborne doesn't look back with regret at not having built a career as a fulltime lawyer. The panel discussion on anti-Semitism drew powerful lawyers from Wall Street and midtown, yet Neuborne seemed completely in his element. "I'm certainly not intimidated," he said. "My career as an academic has also included so much litigation, so much actual lawyering that I move very easily in that world. That's a world where I think people respect me and I respect them. They know I know how to do what they do."

His major regret, he said, is "the unwritten scholarship." He has written perhaps 50 papers, and the piece he is proudest of was one in 1977 about "The Myth of Parity," that business between federal and state courts shouldn't be allocated randomly since each set of courts has certain advantages. But overall, he describes his scholarship as "adequate—I give it a B plus, not in quality, but in quantity."

"For all my talk about being a litigating academic I still believe that the principal and irreducible responsibility of an academic is to produce scholarship," he said. "Our major role is to comment critically on the world in which we live."

"I question whether my litigation victories are more ephemeral than hard thinking would have been, and whether putting my energy into the production of serious thought would have changed things more than winning the lawsuits." Still, such musings don't diminish his retrospective savoring of his career as a law professor. "To be at NYU during the years I've been here," he said, "is like being on a roller coaster that only goes up."

JOSEPH BERGER HAS BEEN A REPORTER AT *The New York Times* FOR MORE THAN 20 YEARS. BERGER IS ALSO THE AUTHOR OF *Displaced Persons: Growing Up American After the Holocaust* (SCRIBNER, 2001).

ILLUSTRATION: NEUBORNE FROG-HUNTING WITH HIS GRANDSON, HENRY; AS A CHILD IN UNIFORM DURING WORLD WAR II; WITH BRUCE SEVERY, KURT VONNEGUT, JUDITH RESNIK ('75), AND ALAN LEVINE IN NORTH DAKOTA IN 1975 ON THE EVE OF TRIAL. NEUBORNE REPRESENTED SEVERY, A HIGH SCHOOL TEACHER, WHO HAD BEEN FIRED FOR TEACHING VONNEGUT'S *Welcome to the Monkey House.*

Students Help Holocaust Victims Recover Funds

First-year law student Robin Zimmerly trained and coordinated volunteers for the project.

In an empty office now used by the Public Service Center for storage, first-year law student Robin Zimmerly shuffles through a mass of paperwork that she has volunteered to help process. There are 2000 forms in all, some of which Zimmerly will enter into an online database; the work can be tedious, but the content of the forms rarely is. The papers are questionnaires filled in by Holocaust survivors, and they represent the latest step in the settlement of several class action lawsuits first filed against Swiss banks in late 1996 and early 1997 in an effort to recover victims' assets. The Holocaust Reparations Pro Bono Project, as students and Public Service Center staff have dubbed the local pro bono effort, has given students a chance to work on a case that has international and historical implications.

"When you learn about something like the Holocaust, six million people is kind of hard to get your mind around." said first-year law student Jen Linker, a volunteer who estimates that she has entered information from 250 forms into the database so far. "It's definitely a more personal look at the Holocaust."

The lawsuits alleged that Swiss banks knowingly retained and concealed assets of Holocaust victims and helped the Nazis by accepting and laundering illegally obtained loot and slave labor profits. The banks agreed to settle the lawsuit in 1998, guaranteeing $1.25 billion for the plaintiffs and class members in exchange for waiving future legal claims against Swiss banks and most Swiss business and government entities. Since then, lawyers and firms involved in the case have advertised the result of the suits and have gathered information from Holocaust survivors now living in the United States through initial questionnaires.

Close to 600,000 questionnaires were filled in by survivors or their heirs, 2000 of which made their way to the Law School after Zimmerly saw the project listed on a Public Service Center email. In February, she contacted Deborah Sturman, who was appointed Special Liaison Counsel by the Court. Sturman asked Zimmerly to train and coordinate students at Virginia to work on the project; first, Zimmerly made a trip to Washington D.C. in February to pick up the eight boxes of paperwork. Once she and other students started working on the project, they realized the forms often told dramatic tales of Holocaust survivors.

"These are people that are sharing stories that otherwise you'd never hear," Zimmerly said. "It's almost like reading history."

"It's not something you can compensate them for—it's so much more traumatic than assets in a bank," said first-year law student Jen Linker, a volunteer for the project. Linker said the project offered students flexibility because volunteers could work on it whenever they had access to a computer.

While many questionnaires include survivors' narratives of their experiences during the Holocaust or descriptions of their stolen assets; other forms have little information because the survivors were too young to remember the years in question. Linker called the forms a "testimony to what happened. It's a dying generation that went through it."

One survivor's questionnaire made an impact on first-year law student Doug Plante. The woman grew up in Poland, where her father owned a shoe store. He and her brother were killed by the Nazis, and the family's possessions were stolen.

"What made the most impact was that she included copies of pictures of her family from when she was a little girl," Plante said. "It's difficult to see the pictures of the happy family before the war, and to know that their life would be torn apart just a few years later. The narrative was much more vivid and unsettling by the inclusion of the pictures, and it made something so incomprehensible seem more real."

Students working on the project review the questionnaires to determine what category a survivor belongs in: Deposited Assets, for those who have unrecovered funds or valuables in Swiss banks; Slave Labor Class I, for those who worked involuntarily for little or no pay under the Nazi regime; Slave Labor Class II, for those who worked involuntarily for little or no pay for Swiss-owned or controlled companies; Refugees, for those who attempted to flee Nazi persecution but were denied entry to Switzerland or were admitted but abused or mistreated; or Looted Assets, for those whose assets were stolen by Nazis and later transacted through Switzerland. Victims or targets of the Nazis who have insurance claims against some Swiss entities are also included in the claim. In addition to categorizing each form's claim, students also enter any information that could help verify the survivors' assets or accounts. Those with verifiable accounts will receive money from the settlement first. About $800 million of the settlement has been allocated to account-holders.

"There's a sense of satisfaction in knowing that people who deserve money are getting compensated for some of their losses," Zimmerly said.

Sturman said 30 law schools are or were involved in processing the forms, in addition to a number of individual law students and attorneys. At least four law firms, NYU Professor Burt Neuborne and several others have been deeply involved in the case, she said. All worked pro bono.

Sturman expects that the entire project will not be finished by the end of the year; about 50,000 forms have been entered into the database so far. Students at the Law School have devoted over 80 hours to the project, but Zimmerly expects she alone will devote 50 to 70 more hours after exam finals, when her schedule clears.

First-year Law student Rina Kushner said working on the case has helped her realize the scope of what lawyers working on the case have accomplished.

"It's giving these people a voice who might not necessarily have had a voice on their own," she said.

- Reported By M. Wood

Law Grounds News Index

THE PLAIN DEALER

Lawyers want millions as cut of Holocaust settlement

Tuesday, August 15, 2000

By STEVE CHAMBERS
NEWHOUSE NEWS SERVICE

On April 12, 1997, Arthur Bailey, one of the dozens of lawyers who helped negotiate a $1.25 billion settlement finalized last month between Swiss banks and **Holocaust** survivors, bought a copy of the book "Nazi Gold" by Tom Bower and spent 8.6 hours reviewing it.

Cost to plaintiffs: $2,365, or $275 an hour.

The item is one of hundreds included in a $13.5 million request for legal fees now before the federal judge overseeing the settlement. That price tag does not include $3 million that attorneys who volunteered their services have asked to be funneled to specific charities, or the $12 million spent to locate plaintiffs.

Some **Holocaust** survivors and Jewish leaders say they are outraged at such requests. They argue that chasing clients and fees in the wake of one of mankind's worst atrocities degrades the memories of the victims.

"We said from the beginning that the lawyers should be acting **pro bono,"** without compensation, said Elan Steinberg, executive director of the World Jewish Congress. "No one should profit from the **Holocaust.** But even more troubling to us than the application for fees are some of the outrageous charges they have made."

In addition to Bailey's time spent reading books, other lawyers' requests include compensation for a 30-minute interview with the Washington Post, a nearly $90,000 bill for photocopying, and billings for lengthy telephone consultations between lawyers.

Many of the attorneys who are working **pro bono** are upset, also, that colleagues would accept money for pursuing what may be the most clear-cut human rights case in the history of the courts.

"They think they get up in the morning and think about the case in the shower and someone should pay them for it," said **Burt Neuborne,** a New York University law professor who headed the settlement team assembled at the behest of the judge.

But some of the same lawyers who have expressed indignation in the case, including Neuborne, will share $50 million being set aside for fees in a separate case, the $4.8 billion settlement with the German government over its use of slave labor during the war.

The legal maze began with the start of negotiations between world Jewish organizations and the Swiss banks in 1995 over reparations for survivors. Jewish leaders were livid about decades of stonewalling by Swiss bankers, who sometimes demanded to see death certificates for those lost in the concentration camps before they would consider heirs' claims to family fortunes.

As these negotiations grew heated, the Clinton administration declassified and released reams of documents that helped detail the looting of Jewish assets during the war and the Swiss purchase of Nazi gold - some of it obtained by melting down the dental fillings of Jewish victims.

Lawsuits apply pressure Ensuing recriminations touched off a flurry of lawsuits on behalf of survivors by at least 27 American lawyers. Those lawsuits begat other lawsuits: against top German companies that had employed slave labor during World War II, insurance companies that refused to pay off policies on **Holocaust** victims, various European governments and other alleged profiteers.

Under mounting pressure, the Swiss proposed the settlement in 1998, helping spur other settlements. It was made final last month, although the legal fees and a disbursement plan are still outstanding.

Many of the same lawyers and plaintiffs are involved in several cases, some still pending, so it is difficult to determine precisely who will benefit in the end.

Several lawyers involved in these ongoing talks defended the legal fees, saying that people seeking justice unsuccessfully for more than five decades are finally ready to realize it.

"Who will get justice in the future if we expect everyone to work for nothing?" asked Edward Fagan of Livingston, N.J., whose $4 million request for fees is the largest in the Swiss bank case.

On July 17, at a ceremony in Germany announcing the slave-labor settlement, Deputy U.S. Treasury Secretary Stuart Eizenstat, a key negotiator in the case, credited lawyers with winning justice for hundreds of thousands of survivors.

Many survivors, relieved that someone is finally being made to pay for the theft of Jewish fortunes, express heartfelt gratitude that lawyers not only listened but were able to squeeze concessions from the bankers and governments of Europe. But others term the settlement funds "blood money" and argue it shouldn't be shared by anyone other than survivors.

Several people involved in the case said they don't expect U.S. District Judge Edward R. Korman to be generous when it comes to legal fees. The judge is expected to hold a hearing in Brooklyn sometime this fall to address fees. He also has to rule on a plan being devised by a court-appointed "special master" for disbursing the money.

"Objections regarding attorneys' fees are premature," the judge said in a one-paragraph reference in his 55-page decision. "Although fee applications have been filed [and do not appear to exceed 1 percent of the total recovery if the applications are granted in their entirety], I have not yet made any decision regarding those applications."

Sorting the claims Like other class-action suits, the Swiss banks' case and its accompanying **Holocaust-**era cases have presented logistical nightmares. Korman, faced with sorting out countless competing actions, asked Neuborne to put together a settlement team that included 10 lawyers.

Even some who are highly critical of Fagan - whose frequent news conferences and combative personality alienated most of his fellow lawyers - concede that his high-profile behavior might have served to put pressure on the banks.

Not everyone agrees, however, that it was brilliant legal strategizing that led to the settlement.

Steinberg credits sanctions threatened by then-Sen. Alfonse D'Amato, New York Republican, and New York City Comptroller Alan Hevesi with forcing the issue. The banks settled days before the sanctions were to take effect.

Regardless of how much money goes for legal fees, the problem of disbursing the remainder is no easy matter. The number of heirs expected to make a case for money deposited in Swiss banks is expected to number in the tens of thousands. But there are half a million more prospective plaintiffs, from slave laborers to people rejected entry into Switzerland during the war.

The legal team already spent $12 million - more money that comes out of the settlement and already approved by the judge - to advertise the settlement worldwide and process roughly 600,000 questionnaires from potential plaintiffs.

The judge's special master, Judah Gribetz, has until Sept. 1 to finish work on his distribution proposal, and the judge has stressed that he wants to begin distributing money to aging survivors as quickly as possible.

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04-1898(L), 04-1899(CON)-cv

To be heard in tandem with 04-2466-cv, 04-2511-cv

United States Court of Appeals

for the

Second Circuit

Samuel J. Dubbin,

Plaintiff-Appellant,

Pink Triangle Coalition, Karl Lange and Pierre Seel,

Interested Parties-Cross-Appellants,

v.

(For Continuation of Caption See Inside Cover)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

LEAD SETTLEMENT COUNSEL'S BRIEF OPPOSING THE HOLOCAUST SURVIVORS FOUNDATION USA, INC.'S OPPOSITION TO THE DISTRICT COURT'S ALLOCATION OF THE SETTLEMENT FUND

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COUNTER-STATEMENT OF THE CASE

A. THE NATURE OF THE SWISS BANK LITIGATION

While the Swiss Bank litigation has involved powerful moral, political and emotional elements,[7] the case was a carefully crafted exercise in the rule of law. Recognizing that crucial fact is the key to understanding Chief Judge Korman's meticulous administration of the Swiss bank settlement.[8]

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[7] The effort has been chronicled in numerous books and a host of articles. *See, e.g.* Michael J. Bayzler, *Litigating the Holocaust*, 34 U. Rich L. Rev. 1 (2000); Burt Neuborne, *Preliminary Reflections on Aspects of Holocaust-Era Litigation in American Courts,* 80 Wash. U. L. Q. 795 (2000); Michael J. Bayzler, *Holocaust Justice: The Battle for Restitution in America's Courts* (2003); Stuart E. Eizenstat, *Imperfect Justice* (2003); Jane Schapiro, *Inside a Class Action: The Holocaust and the Swiss Banks* (2003); John Authers and Richard Wolffe, *The Victim's Fortune: Inside the Epic Battle Over the Debts of the Holocaust* (2002). The allocation issue before the Court in 04-1898 was the subject of an exchange between Lead Settlement Counsel and Professor Thane Rosenbaum in an issue of *The Jewish Week*, Vol.216, No.49, May 7, 2004, 1, 18.

[8] Reported opinions in the Swiss banks case include: *In re Holocaust Victim Assets Litig.,* 1998 U.S. Dist. LEXIS 18014 (E.D.N.Y. Oct. 7, 1998)(joint stipulation describing settlement in principle); *In re Holocaust Victim Assets Litig.,* 105 F. Supp. 2d 139 (E.D.N.Y. 2000)(upholding fairness of settlement); *In re Holocaust Victim Assets Litig.,* 225 F.3d 191 (2d Cir. 2000)(upholding class definition); *In re Holocaust Victim Assets Litig.,* 2000 WL 33241660 (accepting Special Master's recommendation on allocation); *In re Holocaust Victim Assets Litig.,* 14 Fed. Appx. 132 (upholding plan of allocation); *In re Holocaust Victim Assets Litig.,* 282 F.3d 103 (2d Cir. 2002)(dismissing appeal from Slave Labor II self-definition requirement; vacating Slave Labor II class definition for additional proceedings – resolved on remand by stipulation); *In re Holocaust Victim Assets Litig.,* 270 F. Supp. 2d 313 (E.D.N.Y. 2002)(denying risk multiplier; setting attorneys' fees); *In re Holocaust Victim Assets Litig.,* 256 F. Supp. 2d 150 (E.D.N.Y. 2003)(requiring payment of compound interest on escrow fund); *In re Holocaust Victim Assets Litig,.* 302 F. Supp. 2d 89 (E.D.N.Y. 2004), *reh'g denied,* 311 F. Supp. 2d 363

of looted art; (2) the scope of insurance releases; and (3) the means of obtaining information needed to administer the Deposited Assets claims process. Accordingly, at the close of the fairness hearings, Chief Judge Korman directed Lead Settlement Counsel to re-open negotiations on those issues. *See In re Holocaust Victim Assets Litig.*, 311 F. Supp. 2d at 370.

Over the next seven months, the parties hammered out Amendment 2 to the Settlement Agreement dealing with the return of looted art,[11] the availability of information needed to resolve Swiss bank account claims, and a modest insurance claims program involving two Swiss insurance companies. JA651-670. Once Amendment 2 to the settlement agreement had been signed, Lead Settlement Counsel moved for an order declaring the settlement fair and reasonable within the meaning of Rule 23(e). JA497-520, 527-530, 616-642.

Chief Judge Korman upheld the settlement's fairness on July 26, 2000. *In re Holocaust Victim Assets Litig.,* 105 F. Supp. 2d 139 (E.D.N.Y. 2000). The District Court found that the settlement agreement was the result of vigorous arms-length bargaining and, citing this Court's opinion in *In re "Agent Orange" Products Liability Litigation,* 818 F.2d 145, 170 (2d Cir. 1987), held that the proposed bifurcated structure was appropriate because the complexity of any allocation and distribution process made it impossible to inform individuals of the precise amounts they would receive from the settlement prior to the opt-out date.

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[11] Replevin actions in the country where the art is currently found, or from where it was looted were exempted from any release.

Moreover, the District Court found that the procedure for determining allocation in this unique proceeding involving more than one million Holocaust survivors and heirs was fair and reasonable because no structural conflicts relating to economic self-interest prevented Lead Settlement Counsel, who had waived fees in connection with obtaining the settlement, from assisting all members of the class in communicating directly with the Court and the Special Master.

3. Development of the Plan of Allocation and Distribution

On March 31, 1999, Chief Judge Korman appointed Judah Gribetz as a Special Master and directed him to develop such a plan. JA4944 - 4947.

Over the next 18 months, Special Master Gribetz conferred broadly with every interested person who wished to discuss the allocation issue and conducted an intense investigation into the facts and circumstances surrounding plaintiffs' allegations. On September 11, 2000, Special Master Gribetz released a two volume report summarizing the legal and factual bases underlying the claims of each settlement class, and recommending a plan of allocation and distribution. *See generally* JA671-1742. The Special Master found that the claims of the Deposited Assets/Bank Account class were legally and factually considerably stronger than the claims of the remaining four settlement classes. *See* JA729-730, 809-812.

Looted Assets class for *cy pres* relief of the poorest survivors to a total of $205 million.

The tax exempt interest also permitted the Court to increase individual payments to approximately 165,000 surviving slave laborers from $1,000 to $1,450, and also to increase payments to surviving refugees (from $500 or $2,500 to $725 or $3,625, depending on whether the refugee was admitted and mistreated or expelled).

Plaintiffs' court-awarded counsel fees were limited to approximately $6 million, much of which was donated to charity or transferred to individual survivors. *See In re Holocaust Victim Assets Litig.*, 105 F. Supp. 2d at 146; *In re Holocaust Victim Assets Litig.*, 270 F. Supp. 2d at 322 (E.D.N.Y. 2002); *In re Holocaust Victim Assets Litig.*, 302 F. Supp. 2d 89, *reh'g denied*, 311 F. Supp. 2d 363 (E.D.N.Y. 2004)(denying fee application).

The core of the implementation process has, however, been the District Court's efforts to distribute settlement funds to members of the class in accordance with their legal claims.

A. The Deposited Assets Class

The Deposited Assets claims program has made heroic efforts to return the $800 million allocated for payment of claims to Holocaust-era Swiss bank accounts to their true owners. CRT II has published information relating to 21,000 organizations listed in the caption,[20] they lack standing to object to the District Court's *cy pres* allocation orders. *In re Holocaust Victim Assets Litig.*, 225 F.3d 191 (2d Cir. 2000); *In re Holocaust Victim Assets Litig.*, 302 F. Supp. 2d at 115-17. Allowing advocacy organizations like HSF to file allocation objections on behalf of unidentified class members simply encourages ideological and entrepreneurial lawyers to treat the Rule 23 process as a political forum or an economic opportunity. *See Id.* at 115-16.

Most of the organizational appellants in 04-1898 (HSF) do not even attempt to meet the minimum test for organizational standing established in *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333 (1977) by demonstrating on the record that (1) identifiable individual class plaintiffs exist who are members of the organization in question; and (2) circumstances exist rendering it appropriate for the advocacy organization to act as a surrogate for the individual class member. The lack of standing is particularly dramatic in connection with HSF, which consists solely of other organizations in a baroque configuration that requires a telescope to find a flesh and blood person in the layers

[20] The caption in the three related appeals before the panel include at least 34 advocacy groups purporting to appear as appellants.

*1 (S.D.N.Y. Feb. 22, 2001), *aff'd* 42 Fed. Appx. 511 (2d Cir. 2002), stand for the proposition that a lawyer with a substantial economic stake in achieving a settlement cannot bargain away the legal rights of a segment of the class without consideration. In this case, no one's rights are being bargained away by an economically conflicted lawyer. Quite the contrary, the Circuit has already recognized that no member of the Looted Assets class possesses a legally cognizable individual stake in Looted Assets class funds because the enormous size of the Looted Assets class and the difficulty of administering an individualized claims program rendered it impossible to provide payments on an individualized basis. *In re Holocaust Victim Assets Litig.*, 2000 WL 33241660 (E.D.N.Y. Nov. 22, 2000), *aff'd* 14 Fed. Appx. 132 (2d Cir. July 26, 2001). Most importantly, the *cy pres* allocation formula at issue on this appeal was not developed by an economically conflicted lawyer, but by a Special Master and a District Judge engaged in an agonizing effort to allocate scarce funds to those who need them most. In fact, since American survivors have already received more than $125 million in distributions, and since the poorest American survivors will continue to receive between $700,000-800,000 for life, HSF cannot claim that survivors residing in the United States are completely excluded, as in *Super Spuds* and *Auction Houses*. HSF simply wants more at the expense of other, needier survivors.

it can hardly argue that American survivors have been shut out of any aspect of the Swiss bank settlement.

IV.

APPELLANTS' EFFORTS TO CHALLENGE THE BASIC FAIRNESS AND PROCEDURAL GROUND RULES OF THE SETTLEMENT ARE UNTIMELY, DISINGENUOUS, AND DEVOID OF MERIT

A. HSF'S CHALLENGE TO THE FAIRNESS OF THE SETTLEMENT'S STRUCTURE IS BARRED BY PRINCIPLES OF LACHES AND DIRECT ESTOPPEL

During the past three years, over $625 million has been distributed or committed pursuant to the existing ground rules in this extremely complex case. It would invite chaos to entertain HSF's belated challenge to the fairness of those ground rules, especially when the challenges are brought by parties and lawyers who unconditionally withdrew the identical objections more than three years ago, and who now seek to renew the objections only because the scrupulously fair allocation process they agreed to respect has not yet yielded results to their liking.

Thus, even in the absence of a more focused estoppel bar, under the doctrine of laches, it is simply too late to pose a challenge to the basic fairness of the settlement's structure. No objector can wait for three years while approximately $625 million is distributed or committed pursuant to a settlement agreement, and then decide to interpose fundamental fairness objections to the settlement's basic structure.

on whose behalf HSF purports to speak. In any event, the argument is untenable on the merits.

In *Hansberry*, the Supreme Court ruled that a single plaintiff could not adequately represent a class made up of persons with adverse interests. *See also Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999). In *Amchem*, the Supreme Court held that when class counsel has a huge economic stake in achieving a broad class action settlement at the expense of one segment of the plaintiff class, Rule 23 forbids such an economically conflicted class counsel from compromising the interests of the disfavored segment of the class.

Distinguishing *Amchem*, Chief Judge Korman explicitly found that it would be possible to administer the Swiss bank settlement fairly without the undesirable social and economic consequences that would inevitably have flowed from pitting each category of elderly Holocaust survivor against the others in a war of all against all designed to allocate the proceeds of the settlement through classic adversary litigation. *In re Holocaust Victim Assets Litig.*, 105 F. Supp. 2d at 150-151; JA497-520, 527-530, 616-642. Chief Judge Korman noted that, unlike *Amchem*, no structural conflict of interest existed between class counsel and any category of victims because Lead Settlement Counsel had no economic motive to favor one or another category of victims, or to sacrifice the interests of any group of survivors in order to achieve a financially advantageous settlement. *In re Holocaust Victim Assets Litig.*, 105 F. Supp. 2d at 146, 150-151.

Accordingly, the District Court requested Lead Settlement Counsel, with the assistance of other *pro bono* members of plaintiffs' Executive Committee, to serve the interests of all members of the plaintiff-classes without adopting an adversary posture towards any group of survivors.

The District Court appointed a neutral Special Master to prepare recommendations concerning allocation and distribution that would be subject to full consideration and discussion by the plaintiffs and an open hearing prior to adoption by the Court. JA4944-4947. Lead Settlement Counsel was instructed to facilitate the ability of all class members to be heard by the Special Master prior to the recommendation of any plan. Most importantly, the members of the plaintiff-classes were asked to pre-commit themselves to the results of such a fair process without knowing the results in advance. *Uhl v. Thoroughbred Tech. & Telecommunications, Inc.*, 309 F.3d 978 (7th Cir. 2002)(upholding class action settlement where class members pre-commit to allocation process without knowing the amounts they will receive). Those persons unwilling to pre-commit themselves to the results of such a fair process were given the opportunity to opt out. *See Phillips Petroleum, Co. v. Shutts,* 472 U.S. 797 (1985).

Such a scrupulously fair process, devoid of structural conflicts of interest between lawyer and client, voluntarily accepted by the class members, and calculated to provide the fullest consideration of the allocation issues by two tiers of neutral arbiters aided by a Lead Settlement Counsel with a duty to assist all class members in communicating directly with the Court and Special Master, is the very epitome of due process under the unique circumstances of this historic settlement. *See generally*, *In re Austrian & German Bank Holocaust Litig.*, 317 F.3d 91, 102 (2d Cir. 2003); *In re "Agent Orange,"* 818 F.2d 179 (2d Cir. 1987); *Lazy Oil Co. v. Witco Corp.*, 166 F.3d 581, 589-90 (3d Cir. 1999); *In re Corn Derivatives Antitrust Litig.*, 748 F.2d 157, 165 (3d Cir. 1984)(Adams, J., concurring). Geoffrey P. Miller, *Conflicts of Interest in Class Action Litigation: An Inquiry into the Appropriate Standard*, U. Chi. Legal F., vol. 281 (2003); John C. Coffee, *Class Action Accountability: Reconciling Exit, Voice and Loyalty in Representative Litigation*, 100 Colum. L. Rev. 370 (2000); David L. Shapiro, *The Class as Party and Client*, 73 Notre Dame L. Rev. 913 (1998).

CONCLUSION

For the above mentioned reasons the appeal in 04-1898 (HSF) should be dismissed. In the alternative, the thoughtful exercises of discretion by the District Court should be affirmed in all respects.

Dated: New York, New York
August 23, 2004

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04-1898(L), 04-1899(CON)-cv

To be heard in tandem with 04-2466-cv, 04-2511-cv

United States Court of Appeals

for the

Second Circuit

Samuel J. Dubbin,

Plaintiff-Appellant,

Pink Triangle Coalition, Karl Lange and Pierre Seel,

Interested Parties-Cross-Appellants,

— v. —

(For Continuation of Caption See Inside Cover)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

LEAD SETTLEMENT COUNSEL'S BRIEF IN OPPOSITION TO SAMUEL J. DUBBIN'S REQUEST FOR ATTORNEY'S FEES AND EXPENSES

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application, Mr. Dubbin sought approximately $3.6 million in legal fees, of which $600,000 were attributable to the insurance issue, and $3 million to his efforts to influence the Looted Assets allocation formula. *In re Holocaust Victim Assets Litig.*, 311 F. Supp. 2d 363. In addition, Dr. Weiss, a founder of HSF-USA (the principal appellant in 04-1898(L)), sought approximately $2.3 million in fees for research involving the WW II activities of European insurance companies. *Id.*

When the District Court reacted with incredulity to such a blatant effort to profiteer at the expense of the Swiss bank settlement, both Dr. Weiss and Mr. Dubbin reconsidered their respective positions. On March 25, 2004, Dr. Weiss, having obtained new counsel and having had an opportunity to review the District Court's March 9, 2004 opinion denying fees to Mr. Dubbin, withdrew his claim for $2.3 million for insurance-related research work. JA 7960.

On or about June 14, 2003, after the District Court had pointed out that Mr. Dubbin's original application for $5.9 million almost equaled the total fees paid to plaintiffs' counsel in this unique case,[3] Mr. Dubbin submitted an amended

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"SPA.HSF." Appellees have filed a Supplemental Appendix, cited as "SA," that includes relevant record material omitted from the Joint Appendix.

[3] The modest fee structure governing this case is described in *In re Holocaust Victim Assets Litigation,* 270 F. Supp. 2d 313 (E.D.N.Y. 2002). To date, plaintiffs' counsel fees have totaled approximately $6 million, with almost $2 million of that sum donated to charity or transferred to Holocaust victims. *See, e.g.*, JA 5981; 6141; 6156; 6466; 6680.

application, purportedly more in keeping with the settlement's modest fee structure, seeking approximately $550,000 for the purported value of legal services provided to Dr. Weiss in connection with the renegotiation of releases available to Swiss insurance companies. *See* JA 6695, 6699, 6708.

Mr. Dubbin's touted willingness to file an amended fee application more in keeping with the modest fee structure of this case turned out to be bombast. His amended fee application sought $550,000 for insurance-related work, just $50,000 less than the $600,000 sought in the original, bloated application. Moreover, Mr. Dubbin never formally withdrew his original request for $3 million for allocation-related services.

On March 9, 2004, the District Court rejected the portion of Mr. Dubbin's March 15, 2002 application seeking $3 million in fees for work on the allocation issue, finding that Mr. Dubbin's allocation-related work had not conferred a benefit on the plaintiff-classes. The Court promised an opinion on the insurance-related fee application in the near future. *In re Holocaust Victim Assets Litig.*, 302 F. Supp. 2d at 117.

On March 31, 2004, while Chief Judge Korman was completing work on the promised opinion dealing with Mr. Dubbin's amended application for $550,000 for insurance related services, Mr. Dubbin faxed yet a third version of his fee application to the Court, this time for $309,000, plus costs, in connection with his

CONCLUSION

For the above described reasons, the decision of the District Court should be affirmed.

Dated: New York, New York
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UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF FLORIDA
....x

ROSNER et al. v. UNITED STATES

No. 01-1859-CIV
(SEITZ)

....x

The undersigned, acting at the request of numerous members of the plaintiff-class residing in Hungary (hereafter "the Hungarian objectors"),[1] hereby submits this objection to the terms of the proposed settlement agreement:

(1) questioning the fairness of the proposed allocation formula adopted in connection with the settlement herein; and

(2) questioning the size of the pending attorneys' fee applications.

1. **Reservations Concerning the Proposed Allocation Formula**

The parties have determined that distribution of the settlement fund to persons whose property was located on the so-called Hungarian Gold Train is administratively unworkable because, at this time, it is impossible to ascertain their identities and to quantify their actual losses. Instead, the parties propose to distribute the settlement fund on a *cy pres* basis to aid surviving needy Jewish Nazi victims from Greater Hungary. No objection is asserted herein concerning the size of the settlement fund, or the thoughtful decision to devote the settlement fund to needy Jewish Nazi survivors from Greater Hungary. Nor is any objection raised to the proposal to provide modest awards to the named-plaintiffs whose efforts made this settlement possible.

[1] Written authorizations on behalf of eleven class members residing in Budapest are annexed hereto.